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ASSISTANT COMPTROLLER GENERAL OF THE UNITED STATES
Washington 25

B-103571 October 8, 1951

The Honorable
The Secretary of the Navy

My dear Mr. Secretary:

There has been considered your letter of May 17, 1951, forwarding a letter dated March 14, 1951, from the Chief, Bureau of Supplies and Accounts, concerning the retired pay rights of Rear Admiral John H. Hoover, USN, retired, during his employment as a consultant with the Economic Stabilization Agency for the fiscal year 1951, such employment being on an intermittent basis at the rate of $50 per day for each day worked. The said letter of March 14, 1951, also refers to the case of another retired officer, unnamed, stated to have been employed since January 1, 1951, on an intermittent basis by the National Security Resources Board at the rate of $50 per day when employed. On the basis of the circumstances of employment in such cases, you request decision as to "Whether retired officers in receipt of retirement pay are entitled to receive such pay for Saturdays, Sundays and legal holidays, normally non-working days, when employed by a governmental agency on an intermittent basis, either as a consultant or intermittent employee, and when the duties of such employment have been performed at regular rather than at infrequent intervals during the period of such employment."

Copy of "Notification of Personnel Action" in the case of Admiral Hoover, enclosed with the letter of March 14, 1951, from the Chief, Bureau of Supplies and Accounts, shows that, under authority of Section 191(b), Executive Order 10182, the officer was employed, effective December 12, 1950, on an intermittent basis for the fiscal year 1951, at the rate of $50 per day, payment of salary to be made "for each day worked." It is stated that commencing on December 12, 1950, Admiral Hoover worked each day that month with the exception of the 17th, 24th, and 31st, all Sundays, and the 25th, a legal holiday, and that from January 1 to 25, 1951, he was employed every day except the 1st, a legal holiday, and the 7th, 14th, and 21st, all Sundays. In the case of the officer employed by the National Security Resources Board it is stated that he was employed every day in January, 1951, with the exception of the 1st, a legal holiday, the 6th, 13th, and 20th, Saturdays, and the 7th, 14th, 21st, and 28th, Sundays, and that during the month of February he was employed each day except the legal holiday, Sundays, the 5th and 12th, Mondays, the 15th, a Thursday, and the 23rd, a Friday. It is stated, also, that credit of Rear Admiral Hoover's retired pay on days he was actually employed was withheld in accordance with the ruling in decision of December 29, 1948, 28 Comp. Gen. 381, but that the officer has requested payment of retired pay for legal holidays and Sundays when he performed no work in his civilian

position. Doubt as to the right of the officers to their retired pay for Saturdays, Sundays, and holidays, when not working, however, is stated to exist because of the fact that their civilian employment, other than on normal non-working days, approximates the regularity of employment of retired personnel in civilian positions on a full-time per annum basis who, it was held in decision of August 19, 1948, 28 Comp. Gen. 103, are not entitled to retired pay for Saturdays and Sundays which normally are non-work days for the full-time employee.

Section 212 of the Economy Act of June 30, 1932, 47 Stat. 406, as amended, 5 U.S.C. 59a, prohibits the concurrent receipt of retired pay incident to commissioned service and compensation from a civilian office or position under the Federal Government at a combined rate in excess of $3,000 per annum. The rule is well established that such provisions do not preclude the receipt by a permanent full-time employee of retired pay without deduction for periods of absence from his civilian position in a non-pay status. 26 Comp. Gen. 160, and cases therein cited. In the above-cited decision of August 19, 1948, it was held that full-time per annum employees may not be considered as in a non-pay status under that rule on Saturdays and Sundays, normally non-work days, even though such days generally are not included in the salary computation of per annum employees on the 40-hour, five-day work week, it having been stated in that decision, with reference to such employees, that "there generally is no absence from duty on those days /Saturdays and Sundays/ and neither is there any loss of compensation." Unlike the permanent full-time employee, however, the intermittent employee, with compensation accruing only on days when actually working, is clearly in a non-pay status on days when not performing the duties of his civilian position regardless of whether such days happen to be Saturdays, Sundays, or holidays. In view of such consideration, it was held in the decision of December 29, 1948, 28 Comp. Gen. 381, supra--which involved a retired officer of the U.S. Navy who was employed by the Atomic Energy Commission as a consultant on an intermittent basis with compensation of $40 per day when actually working--that "such restrictions /section 212 of the Economy Act/ are applicable only on such days as Rear Admiral Schuyler was in receipt of compensation for his civilian position, and on those days on which he received no compensation from his civilian position he was entitled to receive his full retired pay."

In view of the fact that Rear Admiral Hoover and the officer referred to as employed by the National Security Resources Board were employed on an intermittent basis during the periods in question with compensation accruing to them only for days when actually performing the duties of their civilian positions, they properly may be considered on having been in a non-pay status on all days (including Saturdays, Sundays, and holidays) when not performing such duties and they may be paid their retired pay for all such non-work days, under the rule stated in 28 Comp. Gen. 381, 383, even though the basis of their employment over certain periods might appear to be similar in nature to that of full-time per annum employees. Your question is answered accordingly.

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In connection with the matter of regularity of employment of consultants for extended periods, it seems appropriate to point out that some agencies of the Government have made it a practice to employ experts, and consultants in positions properly within the purview of the classification laws or to retain them in the status of experts or consultants after the duties required of them have developed into positions within the purview of the said classification laws. This Office heretofore has expressed its view that such practice is contrary to the intent of the pertinent statutes and should be discontinued. See decision of June 7, 1951, to the Secretary of Commerce, B-103199, 30 Comp. Gen. 495.

Sincerely yours,

(Signed) FRANK L. YATES

Assistant Comptroller General
of the United States